Supreme Court, U.S.
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No. 98-1498

In The

# Supreme Court of the United States

NAUMAN S. SCOTT, U.S. DISTRICT JUDGE,

*Petitioner,*

v.

MICHAEL P. TONE, ANNE FIEDLER, ROBERT B. BIECK, JR., JAMES W. BERRY, WILLIAM E. WRIGHT, JUDY L. BURNTHORN, W. GLENN BURNS, AND AMERICAN CASUALTY CO. OF READING, PENNSYLVANIA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## JOINT BRIEF IN OPPOSITION OF RESPONDENTS, AMERICAN CASUALTY COMPANY OF READING, PA., MICHAEL P. TONE AND ANNE FIEDLER

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## PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

## CORPORATE LISTING

American Casualty Company of Reading, Pa. is a wholly-owned subsidiary of Continental Casualty Company, which is, in turn, a wholly-owned subsidiary of CNA Financial Corporation. CNA Financial Corporation is a publicly traded corporation which is approximately 90% owned by Loews Corporation.

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## STATEMENT OF JURISDICTION

Petitioner states that review is necessary "to protect the integrity of the judicial system and the ability of district judges to exercise control over their courts." Petition for a Writ of Certiorari of Nauman S. Scott, U.S. District Judge ("Pet.") 1. Thus, the proposed purpose of the petition is indisputably one "in which the United States is interested." 28 U.S.C. § 518(a); *see United States v. Providence Journal Co.*, 485 U.S. 693, 707-08 (1988) ("We conclude that a criminal contempt prosecution brought to vindicate the authority of the Judiciary and to punish disobedience of a court order is a suit 'in which the United States is interested,' within the meaning of § 518(a) . . . . ").

Section 518 confers on the Solicitor General of the United States the authority to litigate cases "in which the United States is interested" before the Court. 28 U.S.C. § 518(a). This authority rests exclusively with the Solicitor General, except for specific exemptions provided by statute. *Providence Journal*, 485 U.S. at 705 n.9. Congress has not conferred on district judges any statutory authority to litigate before the Court. Accordingly, only the Solicitor General had the authority to proceed in this case with a petition for writ of certiorari. 28 U.S.C. § 518; *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 92-93 (1994); *Providence Journal*, 485 U.S. at 708.

The Solicitor General did not timely file a petition for writ of certiorari and did not authorize Petitioner to file one. *See* letter to Lynn H. Frank, counsel for Petitioner, from Seth P. Waxman, Solicitor General, dated April 14, 1999 (copy to William K. Suter, Esquire, on file with Court

and included as Appendix A herewith). Consequently, the Court lacks jurisdiction to hear the case.

## STATUTORY PROVISIONS INVOLVED

Petitioner erroneously suggests that this case involves no statutory provisions. As set forth in the Statement of Jurisdiction in this Opposition, this case involves the application of 28 U.S.C. § 518.

## STATEMENT OF THE CASE

The plaintiffs in the underlying RICO[1] suit moved for sanctions against certain defendants and their attorneys, claiming that those individuals concealed the existence of a CNA[2] liability insurance policy, thus inducing the plaintiffs to enter into a partial settlement of their suit. The plaintiffs did not seek sanctions against CNA or its coverage counsel Michael Tone and Anne Fiedler, but the district court sua sponte added them as defendants in the sanctions proceeding. Bypassing the rules for civil and criminal sanctions, the district court, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), proceeded under the

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[1] Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

[2] "CNA" refers to the CNA group of companies, which includes Respondent American Casualty Co. of Reading, Pa. Respondent American Casualty Co. of Reading, Pa. will be referred to as "CNA" throughout this Opposition.

auspices of its inherent power. The district court appointed counsel for the plaintiffs to prosecute the sanctions matter, despite suggestions from the U.S. Attorney's office that it act as prosecutor.

The plaintiffs' counsel/prosecutor conceded that CNA did not conceal the existence of the policy and that CNA's coverage counsel Tone had agreed to disclose CNA's settlement contribution, both orally to the plaintiffs' counsel and in the written settlement documents, in language that would have put the plaintiffs on notice of the CNA policy. The district court nevertheless singled out CNA, which was not a party to the underlying suit, as the "grand culprit" in a scheme to defraud the plaintiffs and the court. Reasons 67.[3] The district court further held that Tone "masterminded" a "sordid . . . scheme" to "persuade" defense counsel to "conceal" the policy from plaintiffs to induce them to settle. Reasons 29, 45, 64, 67, 69. The district court assessed a $5 million fine against CNA and a $75,000 fine against Tone, payable to the clerk of the court. The district court also issued a reprimand against Fiedler. Reasons 69, 73.

The Fifth Circuit, in *Crowe v. Smith*, 151 F.3d 217 (5th Cir. 1998), reversed the district court's judgment against CNA and Tone on two grounds. First, the Fifth Circuit determined that the fines imposed against CNA and Tone were criminal in nature. *Id.* at 227 ("With regard to these sanctions, we have little difficulty in finding that they

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[3] Respondents adopt Petitioner's form of citation to Judge Scott's Reasons. *See* Pet. 3 n.2.

were criminal in character."). Consequently, the Fifth Circuit vacated the sanctions against CNA and Tone, holding that the appointment of the plaintiffs' counsel as prosecutor violated the strictures of *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), and that the sanctions were constitutionally infirm because the district court failed to provide the procedural safeguards applicable to criminal contempt. *Id.* at 228-29 & n.14.

Second, the Fifth Circuit held that no evidence supported a finding that CNA, Tone or Fiedler engaged in any bad faith conduct that could have supported a sanction under the district court's inherent power. *Id.* at 238. Accordingly, the Fifth Circuit rendered judgment in favor of CNA, Tone and Fiedler. *Id.* at 241.

**A. The petition misstates the facts and the Court of Appeals' disposition of the case.**

Petitioner erroneously declares that "the Court of Appeals did not challenge the factual findings of the district court that Michael Tone and CNA engaged in settlement fraud . . . . " Pet. 15. The Fifth Circuit, however, specifically determined that there was no evidence that CNA, Tone, or Fiedler committed a fraud or engaged in a conspiracy willfully to defraud the Crowes by concealing the insurance policy. *Crowe v. Smith*, 151 F.3d at 237-38. The Fifth Circuit observed that the district court's finding of bad faith was premised on a finding of fraud or conspiracy to defraud. *Id.* at 236. Thus, the court noted, it was required to determine whether the facts were legally sufficient to support such a finding. *Id.* After probing the record in detail, the Fifth Circuit concluded

that, with respect to any known duty to disclose, there was no evidence that CNA, Tone or Fiedler gave any incorrect answer to any discovery request, much less a willfully false response. *Id.* at 238. Further, with respect to the attorneys' duty not to lie in the course of representation, neither Tone nor Fiedler ever engaged in any affirmative misrepresentations concerning the insurance policy. They agreed that the policy's existence and CNA's contribution to the settlement should be disclosed orally to the plaintiffs' counsel, and they drafted language for the settlement papers explicitly naming CNA as a party to the settlement. Record on Appeal, V. 66:125-236, 131, 197, 239-41, 256-57, 263-64; V. 67:256-57; 69:115; V. 70:163-66, 169, 205-06.

Nevertheless, without acknowledging the Fifth Circuit's holding or identifying any evidence contrary to that holding (of which there is none), Petitioner adheres to his original view of the sanction defendants. Petitioner mischaracterizes the record when his petition portrays Tone as the "mastermind" and CNA as a willing accomplice in a "scheme" to defraud the plaintiffs in the underlying RICO lawsuit in order to prevent payment by CNA of "its $5 million policy limits." Pet. 4-7, 9, 10, 21-22, 24-28. Contrary to the record, Petitioner also represents as "undisputed fact" that (1) "CNA and Tone decided to abandon CNA's passive policy and embark on an active policy of fraud," and (2) "[t]he trial judge could only conclude that Tone wanted to be absent if the fraud were discovered." Pet. 7, 9-10. Petitioner's arguments erroneously assume that his findings of fraud against CNA, Tone and Fiedler were supported by factually sufficient

evidence. This assumption is counter to the record and the Fifth Circuit's holding.

## REASONS FOR DENYING THE WRIT

### A. The Court has no jurisdiction over the petition.

As explained in the Statement of Jurisdiction, *see* p. vi, *supra*, Petitioner lacks the authority to bring this case before the Court. *See* 28 U.S.C. § 518; *NRA Political Victory Fund*, 513 U.S. at 92-93; *Providence Journal*, 485 U.S. at 708.

### B. The Fifth Circuit's opinion does not conflict with any opinion of this Court or of another circuit.

According to Petitioner, the Fifth Circuit's decision that the monetary sanctions imposed on CNA and Tone were criminal fines conflicts with the Supreme Court's decisions in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), and *Chambers v. NASCO, Inc.*, 501 U.S. 21 (1991). However, neither *Bagwell* nor *Chambers* suggests that the Fifth Circuit should have reached a different result in this case.

#### 1. The Fifth Circuit followed *Bagwell*.

The Fifth Circuit was guided by *Bagwell's* distinction between civil fines and criminal fines in determining that the fines imposed on CNA and Tone were criminal. Petitioner argues that the fines were civil because they were the least severe sanction that he believed to be appropriate to impose. Pet. at 16; *see also* Pet. 23 ("In Tone's case,

a fine is a better sanction than disbarment or suspension . . . . "). Petitioner would have this Court overrule *Bagwell*. *Bagwell* instructed that "conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from the subjective intent of [the court imposing the sanction], but from an examination of the character of the relief itself." 512 U.S. at 828 (quotation omitted).

"Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge." *Id.* at 829. No such opportunity was afforded here. The fines imposed on CNA and Tone were not compensatory or coercive, but rather, were intended to vindicate the authority of the court. Pet. 6, 14. *Bagwell* makes clear that when the sanction imposed bears none of the characteristics of a civil sanction and all of the qualities of a criminal one, a district court cannot, as Petitioner suggests, deem it to be civil merely because it is the least severe sanction the district court believes to be appropriate under the circumstances.

Petitioner's argument that the fines imposed were petty in amount, and thus not criminal, is also contrary to *Bagwell*. Pet. 22-24. In concluding that the fines imposed on CNA and Tone were criminal, the Fifth Circuit observed that *Bagwell* "strongly suggested, without deciding, that $5000 was an appropriate limit for individuals, and $10,000 for corporations," indicating that higher fines would be considered serious, and thus criminal, in nature. *Crowe v. Smith*, 151 F.3d at 228 n.13 (citing *Bagwell*, 512 U.S. at 837 n.5). Petitioner fails to explain how the $5 million fine assessed against CNA or the $75,000 fine imposed on Tone might be considered petty in light of *Bagwell's* pronouncement. Petitioner does not respond to

*Bagwell's* point – that the sheer magnitude of the fine can impart a civil or criminal character.[4] Moreover, as the Fifth Circuit noted, it did not need to decide the precise limit for a petty fine in this case because the amounts imposed by the district court were so clearly non-petty. 151 F.3d at 228 n.13.

**2. The Fifth Circuit's decision does not conflict with *Chambers*.**

The Fifth Circuit's opinion does not conflict with *Chambers*. The issue in this case is not whether a district court possesses the inherent power to sanction, which *Chambers* answered in the affirmative, but rather the constitutionality of the district court's exercise of that power. *See In re E.I. Du Pont de Nemours & Co. – Benlate Litigation*, 99 F.3d 363, 367 n.3 (11th Cir. 1996), *cert. denied*, 118 S.Ct. 263 (1997). Indeed, the monetary sanction imposed in *Chambers* undoubtedly would have been deemed a civil sanction because it was intended to compensate the opposing litigant for attorney's fees and costs. *See* 501 U.S. at 40. The Fifth Circuit also points out other relevant factual distinctions between *Chambers* and this case. *Crowe v. Smith*, 151 F.3d at 232.

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[4] In arguing that the fines imposed on CNA and Tone were reasonable in light of the magnitude of the underlying RICO judgment, Pet. 22, Petitioner fails to disclose that the underlying RICO judgment was reversed and rendered *before* the district court entered its sanctions judgment. *Crowe v. Smith*, No. 94-41205 (5th Cir. Feb. 26, 1996) (unpublished).

### 3. Other courts of appeals agree with the Fifth Circuit's reasoning.

There are no decisions from other courts of appeals that conflict with the Fifth Circuit's holding that the sanctions imposed on CNA and Tone were criminal in nature. To the contrary, other circuits have reached results that harmonize with the Fifth Circuit's holding. In *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994), the District of Columbia Circuit held that a $100,000 fine imposed on an organization was criminal in nature. *Id.* at 660, 662. The Eleventh Circuit, in *Du Pont*, vacated a $6.8 million fine imposed on Du Pont as a discovery sanction, holding that it was criminal in nature and that Du Pont should have been afforded the procedural safeguards applicable to criminal contempt. 99 F.3d at 369. The Fifth Circuit in this case explicitly noted its agreement with the reasoning and result in *Du Pont*. *Crowe v. Smith*, 151 F.3d at 229 n.15.

## CONCLUSION

As a threshold matter, the petition should not be granted because the Court lacks jurisdiction to hear this case. Further, the questions presented by Petitioner to the Court are merely disputes with the Fifth Circuit's reading of the factual record and its application of a rule of law. These disputes do not merit review by the Court. For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Dated: May 6, 1999

## APPENDIX A

[SEAL] **U.S. Department of Justice**
Office of the Solicitor General

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The Solicitor General

*Washington, D.C. 20530*

April 14, 1999

Lynn H. Frank
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Re: Nauman S. Scott, U.S. District Judge v. Michael P. Tone, et al. Supreme Court No. 98-1498

Dear Ms. Frank:

I am writing to you about the petition for a writ of certiorari in this case. Your client, the petitioner in the Supreme Court, is Nauman S. Scott, United States District Judge. Judge Scott is seeking review, in his official capacity, of the judgment of the court of appeals reversing in part the sanctions he imposed on respondents in connection with an underlying private civil action. As you know, the United States was not a party to the underlying case, and it was not named as a party in either the sanctions proceeding or the court of appeals proceeding. Nevertheless, even assuming that Judge Scott were regarded as a proper party to the appellate proceedings involving the sanctions order he entered, Supreme Court case law calls into question his authority to file a petition for a writ of certiorari seeking review of the judgment of the court of appeals to the extent it reversed his order.

Section 518(a) of Title 28 of the United States Code provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." The Attorney General has in turn delegated that authority and responsibility for "[c]onducting, or assigning and supervising, all Supreme Court cases, including * * * petitions for * * * certiorari," to the Solicitor General, acting "in consultation with each agency or official concerned." 28 C.F.R. 0.20. Congress may, of course, override the general assignment of responsibility to the Solicitor General by specifically conferring on other governmental officers or entities the authority to litigate in this Court. *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988). The Supreme Court has made clear, however, that in the absence of such a specific statutory provision, the authority conferred by Section 518(a) to "conduct and argue" cases in the Supreme Court on behalf of federal governmental entities is exclusive as to any case "in which the United States is interested." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 92-93 (1994); *Providence Journal*, 485 U.S. at 699-700.

In *Providence Journal*, this Court held that the United States was "interested," within the meaning of 28 U.S.C. 518(a), in a case in which a federal district court had appointed a private attorney to prosecute a criminal contempt, even though the matter was initiated at the direction of the district court and was "brought to vindicate the authority of the Judiciary and to punish disobedience of a court order." 485 U.S. at 707-708. The Court specifically

rejected the argument, advanced by the Solicitor General in that case, that Section 518(a) addressed only the question of authority to represent the interests of the Executive Branch. *Id.* at 701.

*Providence Journal* calls into serious question Judge Scott's authority to bring this case to the Supreme Court without having received timely authorization from the Solicitor General. Judge Scott has neither sought or received such authorization. Nor is there any evidence ground to argue that Congress has conferred on Judge Scott the sort of independent statutory authority that would be required to override Section 518(a) if it is otherwise applicable. See *Providence Journal*, 485 U.S. at 705 n.9; *FEC*, 513 U.S. at 93-98.

I understand that Deputy Solicitor General Michael R. Dreeben discussed these issues with you in recent phone conversations. I also understand that Judge Scott has determined to proceed in having the Supreme Court consider the petition for certiorari in this case. Accordingly, I thought it appropriate to communicate more formally to you, counsel for the other parties, and the Court our views on the applicability of Section 518(a) and *Providence Journal*. Thank you for your consideration.

Sincerely,

/s/ Seth P. Waxman
Seth P. Waxman
Solicitor General

cc: All counsel

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